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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

COASTLINE CORP., Plaintiff and Appellant, v. FARMERS & MERCHANTS BANK OF LONG BEACH et al., Defendants and Respondents.	G045077 (Super. Ct. No. 30-2010-00340726) O P I N I O N
HIRSCH PIPE & SUPPLY CO., Plaintiff, v. COASTLINE CORP. et al., Defendants.	(Super. Ct. No. 30-2009-00120206)
GANAHL LUMBER COMPANY, Plaintiff, v. COASTLINE CORP. et al., Defendants.	(Super. Ct. No. 30-2009-00258061)

Appeal from a judgment of the Superior Court of Orange County, David R. Chaffee, Judge. Reversed.

Law Offices of Joseph A. Cardella and Joseph A. Cardella for Plaintiff and Appellant.

Law Offices of Michael Leight, Michael Leight, Michelle Leight; Miller Starr Regalia, Arthur F. Coon and William D. Pahland, Jr., for Defendants and Respondents.

* * *

INTRODUCTION

Coastline Corp (Coastline) recorded a mechanic's lien in June 2009 in connection with its work on a construction project. Coastline's complaint for foreclosure on its mechanic's lien alleged it worked on the construction project through August 2009. Defendants Farmers & Merchants Bank of Long Beach (FMB) and 1520 ECR San Clem, LLC (ECR) demurred on the ground the mechanic's lien was untimely recorded, contending that Coastline was barred from recovering any of the money it claimed for work performed and materials provided. The trial court sustained the demurrers, and denied Coastline leave to amend its complaint, finding an amendment to the complaint alleging the work was completed before the mechanic's lien was recorded would be inconsistent with the existing allegations, and would violate the sham pleading doctrine.

We conclude the record before us, the liberal policy of amendment, and the policy protecting laborers and materialmen through mechanic's liens require that Coastline be permitted the opportunity to amend its complaint to attempt to state a claim. We therefore reverse the trial court's order denying leave to amend the complaint.

STATEMENT OF ALLEGATIONS AND PROCEDURAL HISTORY

Nilop Investments, LLC (Nilop), owned and developed a mixed use condominium project in San Clemente, California (the Project). Nilop hired

Leo Goldberg, doing business as Coastline Construction, to serve as the Project's general contractor. After it was formed as a corporation, Coastline took over as general contractor and completed the Project.

Coastline filed a notice of completion on April 23, 2009, and recorded and served a mechanic's lien claim on June 12, 2009. Coastline worked on the Project through August 2009.

Nilop had obtained construction financing through FMB, which recorded a trust deed on the Project. FMB assigned its interest in the trust deed to ECR; ECR acquired the Project pursuant to a foreclosure sale.

Coastline filed a second amended complaint for foreclosure on its mechanic's lien, and for breach of the covenant of good faith and fair dealing (Civ. Code, former § 3137).[1] (All further statutory references are to the Civil Code.) FMB and ECR filed separate demurrers to Coastline's second amended complaint. The trial court sustained the demurrers without leave to amend. Coastline appealed.[2]

DISCUSSION

I.

STANDARD OF REVIEW

In determining whether Coastline properly stated a claim for relief, our standard of review is clear: "'"We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.]

[1] Title 15 of part 4 of division 3 of the Civil Code, addressing mechanic's liens, was repealed as of July 1, 2012. (Stats. 2010, ch. 697, § 16.)

[2] "We liberally construe [Coastline]'s notice of appeal from the order sustaining the demurrer, a nonappealable order, to be from the subsequent judgment of dismissal." (*Groves v. Peterson* (2002) 100 Cal.App.4th 659, 666, fn. 2.) We further construe the order for entry of judgment to be a judgment of dismissal.

Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.' [Citations.]" (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.)

By arguing only that the trial court erred in failing to grant leave to amend the second amended complaint, Coastline concedes that the complaint, as currently pled, is subject to demurrer.

Leave to amend a complaint after a demurrer has been sustained is proper where there is a "reasonable possibility" that the defect can be cured by amendment. (*Minsky v. City of Los Angeles* (1974) 11 Cal.3d 113, 118.) On appeal, Coastline bears the burden of showing a reasonable possibility that the defects in its second amended complaint can be cured by amendment. (*Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1501.)

II.

CAN THE SECOND AMENDED COMPLAINT BE FURTHER AMENDED TO STATE A CAUSE OF ACTION?

A mechanic's lien is the procedural vehicle for obtaining payment of a debt owed by a property owner for the performance of labor or for the furnishing of materials used in construction. (Former §§ 3109-3154.) The purpose of a mechanic's lien is to prevent unjust enrichment of a property owner at the expense of laborers or material suppliers. (*Abbett Electric Corp. v. California Fed. Savings & Loan Assn.* (1991) 230 Cal.App.3d 355, 360.) Our courts "'"have uniformly classified the mechanics' lien laws

as remedial legislation, to be liberally construed for the protection of laborers and materialmen." [Citation.]'" (*Wm. R. Clarke Corp. v. Safeco Ins. Co.* (1997) 15 Cal.4th 882, 889.)

For a mechanic's lien to be enforceable, a contractor "must record his claim of lien after he completes his contract and before the expiration of (a) 90 days after the completion of the work of improvement as defined in Section 3106 if no notice of completion or notice of cessation has been recorded, or (b) 60 days after recordation of a notice of completion or notice of cessation." (Former § 3115.) The validity of a mechanic's lien depends on its timely recording. (*Howard S. Wright Construction Co. v. BBIC Investors, LLC* (2006) 136 Cal.App.4th 228, 237-238.) In this case, a notice of completion was filed on April 23, 2009. The mechanic's lien claim was recorded on June 12, 2009, before the expiration of the 60 days' limitation period.

"'Completion' means, in the case of any work of improvement other than a public work, actual completion of the work of improvement. Any of the following shall be deemed equivalent to a completion: [¶] . . . [¶] (b) The acceptance by the owner, or his agent, of the work of improvement." (Former § 3086, subd. (b).)

The critical language in the second amended complaint is as follows: "COASTLINE CORP, as a successor in interest to Coastline Construction, worked on the Project through August of 2009, providing labor, services, materials and equipment that were intended to be used and were used in construction of the Project."[3] Additionally, in

[3] Both the original complaint and the first amended complaint alleged, in relevant part: "On or about May 2, 2005, in accordance with the terms and conditions of the Contract, Plaintiff commenced physical work on the Property and continued to work on the Project through August of 2009, pursuant to the above-described Contract, providing labor, services, materials and equipment that were used and intended to be used in the work of improvement on the subject Property."

opposing ECR's motion for judgment on the pleadings, Goldberg, Coastline's president and chief executive officer, submitted a declaration in which he stated: "Coastline Construction and then Coastline Corp continued to work on the Project through August of 2009."

Under the allegations of the second amended complaint, and considering matters of which the trial court could take judicial notice, the recording of the mechanic's lien was not timely, because it was recorded before Coastline completed the work. Coastline argues there is a reasonable possibility the defects in the second amended complaint can be cured by further amendment, because it can allege the work was completed in April 2009, rather than August 2009. FMB and ECR argued, and the trial court agreed, that the only way for Coastline to state a valid cause of action would be to assert allegations that are directly in conflict with the material factual allegations of the second amended complaint (as well as the previous iterations of the original and first amended complaints, and the Goldberg declaration).

"[I]t is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff meets its burden of demonstrating a reasonable possibility that the defect can be cured by amendment. [Citation.] However, when a complaint contains allegations that are fatal to a cause of action, a plaintiff cannot avoid those defects simply by filing an amended complaint that omits the problematic facts or pleads facts inconsistent with those alleged earlier. [Citations.] Absent an explanation for the inconsistency, a court will read the original defect into the amended complaint, rendering it vulnerable to demurrer again. [Citations.]" (*Banis Restaurant Design, Inc. v. Serrano* (2005) 134 Cal.App.4th 1035, 1044.) Does Coastline have an explanation for the inconsistency?

Coastline argues the inconsistency can be explained because the work performed after April 2009 was, among other things, postcontract, warranty work.

Coastline cites to sections 895 through 945.5, which address civil actions for construction defects. Coastline claims that the trial court erred in denying leave to amend to allege the work performed after April 2009 was warranty work because those code sections impose on contractors a duty to perform warranty work for several years after the completion of construction work. The subdivision of the specific code section Coastline cites, section 896, subdivision (e), provides: "With respect to plumbing and sewer issues: [¶] Plumbing and sewer systems shall be installed to operate properly and shall not materially impair the use of the structure by its inhabitants. However, no action may be brought for a violation of this subdivision more than four years after close of escrow." We do not address the legal sufficiency of these arguments; to do so depends on the specific allegations Coastline will seek leave to make and its explanation for doing so.

Coastline also cites a definition from a legal Web site (USLegal.com) to establish the work performed between April and August 2009 was warranty work performed after the work on the Project was completed. We decline to consider the contents of the Web site, as it solicits attorneys from across the country to submit definitions, which are then posted without attribution, and for which the submitting attorney receives a free listing. (<http://definitions.uslegal.com/about/> [as of Sept. 17, 2012].)

FMB and ECR argue the proposed new allegations must be disregarded under the sham pleading doctrine, which prohibits a plaintiff from avoiding demurrer by adding to the complaint new allegations that directly conflict with the existing allegations. "Under the sham pleading doctrine, we are free to disregard inconsistent allegations offered for amendment and we do so here." (*Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1049.) While FMB and ECR argue that the inconsistent allegations in Coastline's proposed amended complaint *must* be disregarded, the holding in *Berg & Berg Enterprises, LLC v. Boyle* is more complicated: "Under the

sham pleading doctrine, allegations in an original pleading that rendered it vulnerable to demurrer or other attack cannot simply be omitted without explanation. [Citation.] The purpose of the doctrine is to enable the courts to prevent an abuse of process. [Citation.] *The doctrine is not intended to prevent honest complainants from correcting erroneous allegations or to prevent the correction of ambiguous facts*. [Citation.]" (*Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 751, italics added.)

The date of "completion" of the Project is a label subject to explanation and proof, and the sham pleading doctrine therefore should not prevent Coastline from amending the second amended complaint to correct it. Indeed, the completion date of a construction project is a question of fact. (*Coss v. MacDonough* (1896) 111 Cal. 662, 665-666 [construction completed when essential and necessary parts of the project are done, even if "a little work" remains incomplete]; *Harlan v. Stufflebeem* (1891) 87 Cal. 508, 511-512 [slight imperfection or omission does not prevent project from being completed for purposes of filing of mechanic's lien claim]; *Baird v. Havas* (1946) 72 Cal.App.2d 520, 523; *Hundley v. Marinkovich* (1942) 53 Cal.App.2d 288, 292 [furnishing and installation of lock after completion of project did not make lien claim timely]; *Nevada County Lumber Co. v. Janiss* (1938) 25 Cal.App.2d 579, 582-583 [after property was occupied, contractor was called back to correct problems in sewer system; project was not completed until the sewer system, which was a necessary part of the project, was fixed].)

Coastline may be able to allege why it is entitled to payment for all the work performed and materials supplied, notwithstanding the date of the recording of its mechanic's lien, and should have been given leave to do so. Accordingly, the trial court erred in concluding there was no reasonable possibility the second amended complaint could be amended.

DISPOSITION

The judgment is reversed. Appellant to recover costs on appeal.

FYBEL, J.

WE CONCUR:

ARONSON, ACTING P. J.

IKOLA, J.